

KELLOGG

414 106673

FINAL ORDER

APPEALED

TO

DISTRICT COURT

Chuck

Approved To Dis Cr.

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL
41U-106673 BY STEPHEN C. KELLOGG) ORDER

The Hearing Examiner issued a Proposal for Decision on March 1, 2001. The Hearing Examiner found and concluded that, with conditions, Applicant had established the criteria for issuance of a beneficial water use permit and recommended granting the Permit. Applicant excepted to the Proposal for Decision (Proposal) on March 20, 2001, and requested an oral argument. Objector Michael Terry submitted exceptions on March 19, 2001. Objector Montana Department of Fish, Wildlife & Parks (MDFWP) responded to Applicant's exceptions. An oral argument hearing was held May 21, 2001.

The basis of Applicant's exceptions is that Applicant's exempt historic water rights entitle Applicant to unconditioned operation of the reservoir. Applicant is apparently misinterpreting Mont. Code Ann. § 85-2-222 which provides that instream flow rights for livestock are exempt from the state-wide adjudication. There is, however, no exemption for reservoirs. For Applicant to have a historic water right for livestock from the reservoir it was necessary to file a claim or the right was abandoned as a matter of law. Mont. Code Ann. § 85-2-227. Applicant did not file a claim for a historic right on the reservoir. Without a historic right, conditions on the operation of the reservoir are necessary to protect the rights of other water users. The conditions must be followed or the reservoir must be drained.

Applicant further argued that a permit is not necessary before a reservoir is constructed, and cites Mont. Code Ann. § 85-2-306(3). While the cited statute may exempt certain ponds for livestock on intermittent streams from obtaining a permit prior to construction, the application is for multiple uses on a perennial stream. The exception therefore does not apply. Moreover,

even if the exception did apply, a permit is required, though after construction. The Department may require the Applicant to modify the impoundment and operations to protect the rights of other appropriators. Mont. Code Ann. § 85-2-306(3) (1999). The remainder of Applicant's exceptions target Finding of Fact 6, which partly attributes the water shortages on the lower end of the source to the blockage to flows when the pond is not full and the inflows are low. Applicant contends the geology, inefficient diversions, and the drought are responsible for the water shortages. Certainly a blockage such as Applicant's dam would contribute to the low flows. The Examiner did not discount the testimony concerning the geology, inefficient diversions, and the drought as the cause of the low flows. He simply stated the fact that this diversion would also contribute to low flows. Other uses or causes of water shortages are not relevant.

Objector Terry's exception was based on the term "high spring flows" and the definition thereof. While "high spring flows" have not been defined in the statutes, it has been defined in a previous hearing as seasonal, sustained, moderately high flows characteristic of a basin or region affected by runoff from the winter snowpack during the months of March through June. Objector Terry also requested protective measures that would account for low runoff periods so prior appropriators would not be adversely affected by Applicant's capture of the flow in the source. It appears the Hearing Examiner has conditioned this permit appropriately to address this concern.

Thus, having given the exceptions and oral arguments due consideration and reviewing the record, the Department hereby adopts the findings and conclusions in the March 1, 2001, Proposal for Decision.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 41U-106673 is **ISSUED** to Stephen C. Kellogg to appropriate 30 gallons per

minute up to 9.6 acre-feet from Joslin Creek at a point in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 18 North, Range 07 West; and from an unnamed tributary of Joslin Creek at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 18 North, Range 07 West, both in Lewis and Clark County, Montana. The means of diversion is a dam on Joslin Creek, and a pipeline from the unnamed tributary of Joslin Creek to the dam on Joslin Creek. The period of appropriation is January 1 through December 31, inclusive, of each year. The use is 30 gpm up to 1.5 acre-feet for domestic use from January 1 through December 31, inclusive, of each year, 30 gpm up to 5 acre-feet for lawn and garden use on two acres from April 1 through October 31, inclusive, of each year, 30 gpm up to 0.1 acre-feet for stock use from January 1 through December 31, inclusive, of each year, and up to 3 acre-feet for fishery use from January 1 through December 31, inclusive, of each year. The place of use is in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 18 North, Range 07 West, Lewis and Clark County, Montana. The place of storage is an onstream 3 acre-foot reservoir on Joslin Creek in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 35.

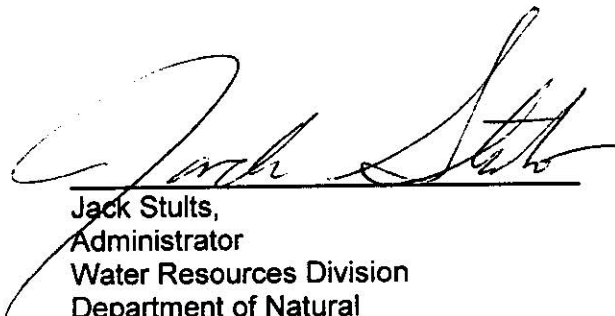
- A. The pond can be filled or refilled only during high spring flows.
- B. The outflow of the pond must always be equal to or greater than the inflow after the pond is filled in the spring.
- C. Permittee must install measuring devices that measure total pond inflow and pond outflow from the outlet pipe. The appropriator may seek Department assistance with how best to obtain the necessary measurements. Water must not be diverted until the required measuring devices are in place and operating. On a form provided by the Department, the appropriator shall keep a written monthly record of the flow rate and volume of all waters flowing into and out of the pond, including the period of time. Records shall be submitted by November 30th of each year and upon request at other times during the year. Failure to submit reports may be cause for revocation of a permit or change. The records must be sent to the Water Resources Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

D. Applicant must install a device that releases pond inflows as measured in Condition C (above) during periods outside the high spring runoff period. Such device must match pond inflow and outflow.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order. If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the proceedings to the district court.

Dated this 2ND day of JULY, 2001.



Jack Stults,
Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601
406-444-6605

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Final Order was served upon all parties listed below on this 3rd day of July, 2001.

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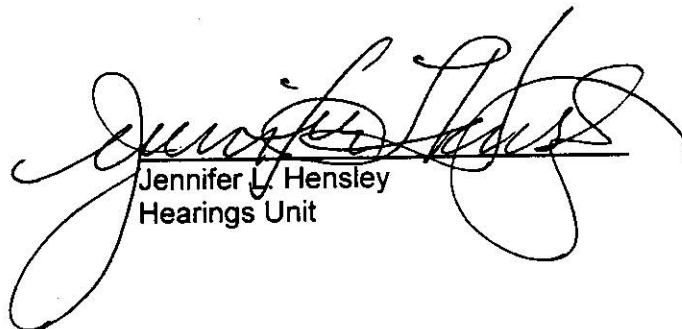
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Jennifer L. Hensley
Hearings Unit

Chuck

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA
* * * * *

IN THE MATTER OF THE APPLICATION FOR)
BENEFICIAL WATER USE PERMIT 41U-)
106673 BY STEPHEN C. KELLOGG)

PROPOSAL
FOR
DECISION

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307 (1999), a hearing was held on August 18, 2000, in Helena, Montana, to determine whether a beneficial water use permit should be issued to Stephen C. Kellogg for the above application under the criteria set forth in Mont. Code Ann. §85-2-311 (1999).

APPEARANCES

Applicant appeared at the hearing in person and by and through counsel Gregory W. Duncan. David M. Schmidt, Senior Water Rights Specialist, Water Right Solutions; Gary Franklin, area resident; and Ron Prewett, President, Prewett Excavating and Construction, Inc. appeared as witnesses for Mr. Kellogg. Objectors Michael Terry, Sr.; Joy Mora; and Steve Leathe, Regional Fisheries Manager, Region 4, were called as witnesses by the Applicant.

Objector Michael Terry, Sr. (Diamond Bar X Guest Ranch) appeared at the hearing in person. Dean and Joy Mora appeared at the hearing in person. James R. "Andy" Anderson was called to testify by Objector Mora. Objector Montana Fish, Wildlife and Parks (hereafter DFWP) appeared at the hearing by and through counsel Rebecca J. Dockter Engstrom. DFWP called Kathleen Williams, DFWP Water Resources Program Manager; and Steve Leathe, Regional Fisheries Manager, Region 4, as witnesses by the Objector DFWP.

Terri McLaughlin, Acting Chief, Water Right Bureau, and Jim Beck, Acting Regional Office Manager, Helena Water Resources Regional Office of the Department of Natural Resources and Conservation (hereafter Department) were called to testify by the Objector DFWP.

CASE # 106673

EXHIBITS

Both Applicant and Objectors offered exhibits for the record.

Applicant offered 46 exhibits for the record. The Hearing Examiner accepted Applicant's Exhibits 1 through 46.

Applicant's Exhibit A1 is a photograph of the Kellogg pond facing north.

Applicant's Exhibit A2 is a photograph of water flowing in the east (Helena Regional Office [HeRO] labeled this the north fork on their field investigation map) fork coming into the Kellogg pond.

Applicant's Exhibit A3 is a photograph of water flowing in the east fork into the Kellogg pond.

Applicant's Exhibit A4 is a photograph of water flowing in the west (HeRO labeled this the south fork on their field investigation map) fork into the Kellogg pond.

Applicant's Exhibit A5 is a photograph 10' upstream of the west fork into the Kellogg pond.

Applicant's Exhibit A6 is a photograph of livestock on Kellogg property.

Applicant's Exhibit A7 is a photograph of groundwater on Kellogg property.

Applicant's Exhibit A8 is a photograph of groundwater on Kellogg property.

Applicant's Exhibit A9 is a photograph of the Kellogg pond from the groundwater shown in A8 and A9.

Applicant's Exhibit A10 is a photograph looking across the Kellogg pond in a westerly direction.

Applicant's Exhibit A11 is a photograph of the discharge from the Kellogg pond.

Applicant's Exhibit A12 is a photograph of Joslin Creek immediately downstream of the Kellogg pond.

Applicant's Exhibit A13 is a photograph of Joslin Creek immediately downstream of the Kellogg pond.

Applicant's Exhibit A14 is a photograph of Joslin Creek further downstream of the Kellogg pond showing increased flow.

Applicant's Exhibit A15 is a photograph of Joslin Creek further downstream of the Kellogg pond showing increased flow.

Applicant's Exhibit A16 is a photograph of the west (HeRO labeled this the south fork) of Joslin Creek which flows into Joslin Creek downstream of the Kellogg pond.

Applicant's Exhibit A17 is a photograph of Joslin Falls which is upstream of the Diamond Bar X Guest Ranch corrals.

Applicant's Exhibit A18 is a photograph of Joslin Falls which is upstream of the Diamond Bar X Guest Ranch corrals.

Applicant's Exhibit A19 is a photograph of Joslin Falls which is upstream of the Diamond Bar X Guest Ranch corrals.

Applicant's Exhibit A20 is a photograph of the Mora home, lower Joslin Creek, and the Dearborn River alluvial plain.

Applicant's Exhibit A21 is a photograph of gravel excavation about 1/8 mile northeast of the Diamond Bar X Guest Ranch to show the nature of the area gravel.

Applicant's Exhibit A22 is a photograph of Joslin Creek (dry) under the county road below the Mora residence.

Applicant's Exhibit A23 is a photograph of Diamond Bar X lawn watering.

Applicant's Exhibit A24 is a photograph of Joslin Creek water about 250-300' above Diamond Bar X Guest Ranch's corrals.

Applicant's Exhibit A25 is a photograph of Joslin Creek water about 250-300' above Diamond Bar X Guest Ranch's corrals.

Applicant's Exhibit A26 is a photograph of Joslin Creek about 250-300' above Diamond Bar X Guest Ranch's corrals.

Applicant's Exhibit A27 is a photograph of Joslin Creek immediately below A25 and A25.

Applicant's Exhibit A28 is a photograph of Mora diversion on Joslin Creek.

Applicant's Exhibit A29 is a photograph of a diversion about 100 yards upstream of the Mora diversion on Joslin Creek.

Applicant's Exhibit A30 is a photograph of Joslin Creek about 40' downstream of Diamond Bar X Guest Ranch.

Applicant's Exhibit A31 is a photograph of Diamond Bar X livestock water gap on Joslin Creek.

Applicant's Exhibit A32 is a photograph of Diamond Bar X livestock water gap and impoundment on Joslin Creek.

Applicant's Exhibit A33 is a report consisting of 7 pages prepared by Water Right Solutions, Inc. for Applicant Kellogg.

Applicant's Exhibit A34 is a letter from Joslin Creek Basin property owner Converse stating his observations of Joslin Creek flows.

Applicant's Exhibit A35 is a letter from Joslin Creek Basin property owner Campbell stating his observations of Joslin Creek flows.

Applicant's Exhibit A36 is a letter from Joslin Creek Basin property owner Gary Franklin offering information on the historical dam structure and his opinion on the current dam and pond.

Applicant's Exhibit A37 is a letter from Joslin Creek Basin property owner Lee stating his observations of Joslin Creek flows.

Applicant's Exhibit A38 is a letter from Joslin Creek Basin property owner McCartney stating his observations of Joslin Creek flows.

Applicant's Exhibit A39 is a letter from a former property owner regarding the history of the pond in the area now owned by Kellogg.

Applicant's Exhibit A40 is a GIS three dimensional representation of the USGS Bean Lake quadrangle map prepared by Water Right Solutions, Inc. to be used for demonstrative purposes only.

Applicant's Exhibit A41 is a one page estimation of annual Kellogg pond evaporation loss prepared by Water Right Solutions, Inc.

The objection to this exhibit is over-ruled; the exhibit is admitted as Applicant's estimate of evaporative loss from the pond.

Applicant's Exhibit A42 is a sketch by Water Right Solutions, Inc. of the thrust faulting in the Joslin Basin.

Applicant's Exhibit A43 is a diagram of the Kellogg dam and pond drawn by Ron Prewett, dated 9/1/93.

Applicant's Exhibit A44 is a copy of Kellogg's on-site wastewater treatment system permit and application.

Applicant's Exhibit A45 is an enlarged pre 1992 photograph of the upstream face of the Kellogg dam before it was repaired.

Applicant's Exhibit A46 is a letter from the Lewis and Clark Conservation District regarding a complaint on the Kellogg pond.

Objector DFWP offered two exhibits for the record. The Hearing Examiner accepted Objector's Exhibits 1 and 2.

Objector DFWP's Exhibit 01 is a 1963 USGS quadrangle map.

Objector DFWP's Exhibit 02 is a diagram of the dam with hand drawn additions.

Objector Terry offered 10 exhibits for the record. The Hearing Examiner accepted Objector's Exhibit 3 through 10.

Objector Terry's Exhibit 01 is a two page website printout on *Free Water Surface Evaporation*. The exhibit was redundant and not admitted.

Objector Terry's Exhibit 02 is a four page website printout on *Coefficients to Convert Class A Pan Evaporation to Free Water Surface Evaporation*. The exhibit was redundant and not admitted.

Objector Terry's Exhibit 03 is one page website printout on the "equation for the actual rate of evaporation of water".

Objector Terry's Exhibit 04 is a two page website article on beaver dams.

Objector Terry's Exhibit 05 is a five page website printout on *Reducing Pond Seepage*. This exhibit was accepted for demonstrative purposes only.

Objector Terry's Exhibit 06 is a single page containing 6 photograph copies (a-f).

Objector Terry's Exhibit 07 is a single page containing 5 photograph copies (a-e).

Objector Terry's Exhibit 08 is a copy of a 1968 Diamond Bar X sales flyer.

Objector Terry's Exhibit 09 is a single page containing 9 photograph copies (a-i).

Objector Terry's Exhibit 010 is a single page containing 7 photograph copies (a-g).

Objector Mora offered 11 exhibit for the record. The Hearing Examiner accepted Objector's Exhibits 1 through 11.

Objector Mora's Exhibit 01 is an 18 page copy of a information provided to objector Mora by Applicant Kellogg.

Objector Mora's Exhibit 02 contains 3 pages of information regarding Objector Mora's water right.

Objector Mora's Exhibit 03 is a 1995 USGS Bean Lake quadrangle map.

Objector Mora's Exhibit 04 is a copy of an August 8, 1990 USFWS aerial photo.

Objector Mora's Exhibit 05 is a copy of an September 14, 1995 USFWS aerial photo.

Objector Mora's Exhibit 06 is a copy of an August 2, 1999 USFWS aerial photo.

Objector Mora's Exhibit 07 is a May 6, 2000 photograph showing Joslin Creek.

Objector Mora's Exhibit 08 is a May 6, 2000 photograph showing Joslin Creek.

Objector Mora's Exhibit 09 is a August 11, 2000 photograph showing Joslin Creek above Mora's pump.

Objector Mora's Exhibit 010 is a August 11, 2000 photograph showing Joslin Creek at Mora's pump.

Objector Mora's Exhibit 011 is a notarized copy of a USGS quadrangle map upon which Mr. Ida hand wrote his testimony of the stream flows. The exhibit was admitted only for Mr. Ida's streamflow testimony.

PRELIMINARY MATTERS

There was much discussion and testimony about the original dam constructed prior to the 1970's which was washed out and replaced multiple times at the site of the current pond. However, the pending application is for a new reservoir. Whether or not any of the water

uses applied for here may have been associated with previous ponds is not relevant.

The record of the hearing was left open for receipt of Jim Beck's estimation of evaporation from the pond. Mr. Beck's estimation was copied to all parties.

The Hearings Examiner reopened the record upon Applicant motion for evidence establishing the volume of water necessary for fishery purposes. Steve Leathe's December 19, 2000 letter is the evidence provided and is included in the record of this matter.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 41U-106673 in the name of and signed by Stephen C. Kellogg was filed with the Department on February 11, 1999. (Department file)
2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.
3. Applicant seeks to appropriate a total of 30 gallons per minute (hereafter gpm) up to 9.6 acre-feet from Joslin Creek at a point in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 18 North, Range 07 West and an unnamed tributary of Joslin Creek at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 18 North, Range 07 West, both in Lewis and Clark County, Montana. The proposed means of diversion is a dam on Joslin Creek and a pipeline from the unnamed tributary of Joslin Creek to the reservoir created by the dam on Joslin Creek. The proposed period of appropriation is January 1 through December 31, inclusive, of each year. The proposed use is 30 gpm up to 1.5 acre-feet for domestic use from January 1 through December 31, inclusive, of each year; 30 gpm up to 5 acre-feet for lawn and garden use on two acres from April 1 through October 31, inclusive, of each year; 30 gpm up to 0.1 acre-feet for stock use from January 1 through December 31, inclusive, of each year; and up to 3 acre-feet for fishery use from January 1

through December 31, inclusive, of each year. The proposed place of use is in the NE~~1~~SW~~1~~SE~~1~~ of Section 35, Township 18 North, Range 07 West, Lewis and Clark County, Montana. The proposed place of storage is an onstream 3 acre-foot reservoir on Joslin Creek in the NE~~1~~SW~~1~~SE~~1~~ of said Section 35. (Department file, Applicant testimony)

4. Applicant has proven water is physically available. Applicant measured flows monthly from March 1998 through February 1999, at the proposed point of diversion. This period was a low precipitation period. The flows ranged between 77 gpm and 749 gpm; September and November 1998 had no flow; January and February 1999 had ice but no measurable flow. Flows in the area are intermittent and typically decline or cease in the fall. The pond will allow Applicant to store water in the spring when flows are high for use during times of low or non existent flows. (Department file, testimony of Applicant, David Schmidt)

5. Applicant has proven water is legally available. When water stored during spring runoff is considered, downstream rights do not exceed the flows the applicant measured at the proposed site. There are tributaries to Joslin Creek between the proposed project and downstream appropriators, and subsurface flows which contribute to channel flows between Applicant and downstream appropriators. (Department file, testimony of Stephen Kellogg, David Schmidt)

6. Applicant has proven there would be no adverse effect to the water rights of prior appropriators under an existing water right, certificate, permit, or state water reservation when Applicant installs a device so that pond outflows match inflows. The recent water shortages on the lower end of the source are in part attributable to the blockage of flows when the pond is not full and the inflows are low. The record does not contain sufficient information to conclude the pond outflow rate at which adverse affect begins to occur, and the issue cannot be ignored. If Applicant were to release all water flowing into the reservoir except during high spring runoff these shortages could not be attributed to the dam.

A comparison of net evaporative losses from the proposed pond and the stream before the pond was constructed shows there would be 1.58

acre-feet more water below the pond if it were not there. These losses only cause adverse effect when flows are low. If the dam is operated after spring runoff so that outflows equal or exceed inflows, adverse effects from evaporation can be avoided.

Applicant's hypothesis that seepage from the pond contributes to downstream flows is not based upon a detailed study of the formations and subsurface flows in the area. Without more information the downstream channel gains cannot be attributed to the pond.

(Department file and records, testimony of Applicant, Dave Schmidt, Objector Terry, Objector Mora, Jim Beck Memo of August 23, 2000)

7. Applicant has proven the proposed means of diversion, construction, and operation of the appropriation works are adequate when Applicant installs a device that passes pond inflow, and Applicant measures pond inflow and outflow. The pond was reconstructed using a contractor with experience in pond construction.

The design and construction of the embankment dam includes a trickle tube spillway and emergency spillways on each abutment. Applicant has a workable plan for using a siphon and outlet so that water can be released from the pond to avoid adverse effect and be nonconsumptive.

(Department file, Department records, testimony of Jim Beck)

8. The proposed project is within the Upper Missouri River basin closure area. Montana Code Ann. §85-2-342. The issuance of water use permits is restricted within the closure area. The exceptions to the closure include domestic and stock use, nonconsumptive uses, and storage during high spring runoff. Domestic and stock use are not exempt from the adverse affect criteria which applies at low flows in this case as discussed in Finding of Fact 6 (above). Fishery use and evaporation from the pond are not exceptions. However, Applicant's project fits within these exceptions when the dam is operated after spring runoff so that outflows equal or exceed inflows. The lawn and garden use is part and parcel of the domestic use. (Department file, testimony of Kathleen Williams, Steve Leathe, Jim Beck)

9. Applicant has proven the proposed use of water for domestic, lawn and garden, and livestock is beneficial. The amounts requested are reasonable for the proposed uses according to the Department's general

water requirements (Form 615 [R7/00]). The storage volume of the pond is less than the sum of the individual purpose volumes. (Department file, Department records)

10. Applicant has proven the proposed use of water for the fishery use is beneficial. Applicant has a DFWP Private Lake or Pond License (#4-990030) to plant four trout species. Trout require high oxygen and cool temperature environments for which pond depth is a critical factor. Ponds supported by runoff need an actual depth of ten feet (10') for one-fifth of the pond area to maintain a viable fish population. Applicant's pond is ten feet deep. Fish now live in the pond. In this case the minimum depth of water for a viable fishery coincides with the actual pond depth. The pond volume at the ten feet depth is three acre-feet; thus, the volume of the pond does not exceed that required to sustain a fishery at this location. (Department file, Department records, testimony of Applicant, David Schmidt, Steve Leathe letter of December 19, 2000)

11. Applicant has proven he has possessory interest in the property where the water is to be put to beneficial use. (Department file, Applicant testimony)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 (1999).
2. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. Mont. Code Ann. §85-2-312 (1999).
3. Applicant has met, or there are conditions which can satisfy, the criteria for issuance of a beneficial water use permit. See Findings of Fact 4 through 11. Mont. Code Ann. §85-2-311 (1999).

4. This permit fits the exceptions to the Upper Missouri River basin closure, when conditioned to be nonconsumptive and it is filled during high spring flows. Montana Code Ann. §85-2-343.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 41U-106673 is **ISSUED** to Stephen C. Kellogg to appropriate 30 gallons per minute up to 9.6 acre-feet from Joslin Creek at a point in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 18 North, Range 07 West; and from an unnamed tributary of Joslin Creek at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 18 North, Range 07 West, both in Lewis and Clark County, Montana. The means of diversion is a dam on Joslin Creek, and a pipeline from the unnamed tributary of Joslin Creek to the dam on Joslin Creek. The period of appropriation is January 1 through December 31, inclusive, of each year. The use is 30 gpm up to 1.5 acre-feet for domestic use from January 1 through December 31, inclusive, of each year, 30 gpm up to 5 acre-feet for lawn and garden use on two acres from April 1 through October 31, inclusive, of each year, 30 gpm up to 0.1 acre-feet for stock use from January 1 through December 31, inclusive, of each year, and up to 3 acre-feet for fishery use from January 1 through December 31, inclusive, of each year. The place of use is in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 18 North, Range 07 West, Lewis and Clark County, Montana. The place of storage is an onstream 3 acre-foot reservoir on Joslin Creek in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 35.

- A. The pond can be filled or refilled only during high spring flows.
- B. The outflow of the pond must always be equal to or greater than the inflow after the pond is filled in the spring.
- C. Permittee must install measuring devices that measure total pond inflow and pond outflow from the outlet pipe. The appropriator may seek Department assistance with how best to obtain the necessary measurements. Water must not be diverted until the required measuring

devices are in place and operating. On a form provided by the Department, the appropriator shall keep a written monthly record of the flow rate and volume of all waters flowing into and out of the pond, including the period of time. Records shall be submitted by November 30th of each year and upon request at other times during the year. Failure to submit reports may be cause for revocation of a permit or change. The records must be sent to the Water Resources Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

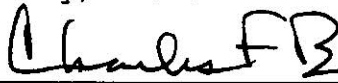
D. Applicant must install a device that releases pond inflows as measured in Condition C. (above) during periods outside the high spring runoff period. Such device must match pond inflow and outflow.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 27th day of February, 2001.


Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Notice and Order Reopening the Record was served upon all parties listed below on this 1st day of March, 2001.

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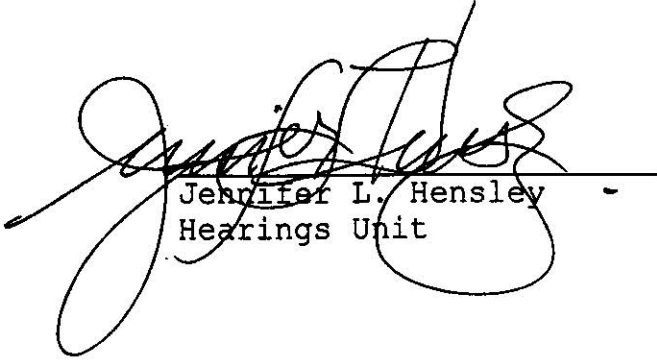
JEFF JARACZESKI
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